



SUBMITTED ELECTRONICALLY
Via FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667

Re: Freedom of Information Act Request for Correspondence Regarding the Lautenberg Act

Dear National Freedom of Information Officer:

Environmental Defense Fund (EDF) respectfully requests records, as that term is described at 5 U.S.C. § 552(f)(2) of the Freedom of Information Act (FOIA), of the U.S. Environmental Protection Agency (EPA or the Agency). Specifically, EDF requests copies of all records containing or documenting correspondence and communications between EPA and Congress related to the negotiation and passage of the “Frank R. Lautenberg Chemical Safety for the 21st Century Act” (hereinafter, the Lautenberg Act). Pub. L. No. 114-182, 130 Stat. 448 (2016) (amending the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2629).

EDF requests that EPA provide any correspondence or communications (hereinafter, correspondence) that EPA sent to or received from Congress, congressional members, congressional subcommittees, or congressional staff regarding the bills that became the Lautenberg Act during the 114th Congress. Responsive records include, but are not limited to, correspondence relating to one or more of the following items:

- 1) H.R. 2576, 114th Cong.
- 2) S. 697, 114th Cong.
- 3) The Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016)
- 4) The Toxic Substances Control Act (TSCA)

Responsive records also include, but are not limited to, correspondence relating to provisions that include or refer to any one of the following phrases:

- 5) “conditions of use”
- 6) “best available science”
- 7) “weight of the scientific evidence”
- 8) “reasonably foreseen” or “reasonably foreseeable”
- 9) “consideration of costs or other nonrisk factors”
- 10) “reasonable potential for exposure”

- 11) “aggregate or sentinel exposures”
- 12) “potentially exposed or susceptible subpopulation”
- 13) “low-priority substance”
- 14) “scope of the risk evaluation”
- 15) “existing claim for protection against disclosure”
- 16) “not readily discoverable through reverse engineering”
- 17) “initial list of active substances”
- 18) “completed risk assessment”
- 19) “makes a determination under subparagraph (A), (B), or (C)”
- 20) “as determined by the Administrator”

While TSCA reform took many years, EDF currently only seeks records produced, modified, or transmitted from January 3, 2015, to January 3, 2017, the time of the 114th Congress. The requested records specifically include, but are not limited to, hard-copy correspondence and electronic correspondence such as emails (including attachments), text messages, facsimiles, and correspondence transmitted through any other electronic platform.¹ In addition, the records include any notes, minutes, other writings, or records from calls or meetings between EPA employees and congressional staff or congressional members regarding the legislation leading to the Lautenberg Act.

If any of the information sought in this request is deemed by EPA to be properly withheld under a FOIA exemption, 5 U.S.C. § 552(b), please provide EDF with an explanation, for each such record or portion thereof, sufficient to identify the record and the particular exemption(s) claimed. We would note that the requested records do not fall within Exemption 5 because they are not “inter-agency or intra-agency memorandums or letters.” 5 U.S.C. § 552(b)(5).² In the

¹ Responsive records would include correspondence to or from Sven-Eric Kaiser (Kaiser.Sven-Erik@epa.gov) in the Office of Congressional and Intergovernmental Relations. Mr. Kaiser may also be able to identify other relevant custodians. The legislative history reflects that the following EPA staff also worked on the bill: Brian Grant, David Berol, Don Sadowsky, Jim Jones, Kevin McLean, Laura Vaught, Nicole Distefano, Priscilla Flattery, Ryan Schmit, Ryan Wallace, Scott Sherlock, Tristan Brown, and Wendy Cleland-Hamnet. *See* 162 Cong. Rec. S3511 (daily ed. June 7, 2016). Correspondence to or from the following congressional staffers is likely to be relevant: Michal Freedhoff (Michal_Freedhoff@markey.senate.gov), Dimitri Karakitsos, and Jonathan Black. The legislative history reflects that the following congressional staff also worked on the bill: Adrian Deveny, Andrew (Drew) Wallace, Adam Zipkin, Brendan Bell, Ben Dunham, Bill Ghent, Bettina Poirier, Bianca Ortiz Wertheim, Bryan Zumwalt, Chris Sarley, Dave McCarthy, Deanna Edwards, Eleanor Bastion, Emily Enderle, Emily Spain, Jason Albritton, Jacqueline (Jackie) Cohen, Jasmine Hunt, Jerry Couri, Jean Frucci, Mike Collins, Maureen Contreni, Michelle Johnson-Weider, Mary Frances Repko, Rick Kessler, Sergio Espinosa, Tina Richardson, and Tuley Wright. *See* 162 Cong. Rec. S3511 (daily ed. June 7, 2016). This information does not in any way limit the scope of our request and is provided solely to assist EPA in the search for responsive records.

² Section 551(1) defines “agency” for purposes of FOIA as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but *does not include . . . the Congress.*” 5 U.S.C. § 551(1) (emphasis added). Therefore courts have repeatedly ruled that records sent from an agency to Congress or a congressional

past, EPA has fully granted similar requests for correspondence between Congress and EPA, establishing a precedent that such materials are not exempt.³

Request for Expedited Processing

EDF respectfully seeks expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E)(i) and 40 C.F.R. § 2.104(e)(1)(ii), which applies when there is “[a]n urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public.” In support of this request for expedited processing, I certify that the following information is true and correct to the best of my knowledge and belief:

- 1) EDF engages in extensive, often daily efforts to inform the public about matters involving environmental policy. For example, EDF has multiple channels for distributing information to the public, including through direct communication with its more than two million members, activists, and supporters, press releases, blog posts, active engagement on social media, and frequent appearances by staff in major media outlets.⁴

committee do not qualify for Exemption 5. *See, e.g., Dow Jones & Co. v. Dept. of Justice*, 908 F.2d 1006, 1009 (D.C. Cir. 1990); *Elec. Frontier Found. v. Office of the Dir. of Nat’l Intelligence*, 639 F.3d 876, 889 (9th Cir. 2010).

³ *See, e.g.*, FOIA Tracking No. EPA-HQ-2016-006121, Final Disposition, *available at* <https://goo.gl/j6vQGj> (full grant of “all correspondence between EPA and Congress” regarding questions and answers related to hearings) (last visited Dec. 14, 2017); FOIA Tracking No. EPA-R6-2017-006166, Final Disposition, *available at* <https://goo.gl/abUbFd> (full grant of correspondence relating to study, including materials received from Senator and sent to Senator) (last visited Dec. 14, 2017); FOIA Tracking No. EPA-HQ-2017-005286, Final Disposition, *available at* <https://goo.gl/1AoT8Q> (full grant of all copies of Congressional correspondence between EPA and a particular Representative) (last visited Dec. 14, 2017).

⁴ *See, e.g.*, Suzy Khimm, *Trump’s controversial pick for EPA post withdraws nomination*, NBC NEWS (Dec. 14, 2017), <https://www.nbcnews.com/politics/white-house/trump-s-controversial-pick-epa-post-withdraws-nomination-n829596> (quoting Richard Denison, a lead senior scientist at EDF); Brady Dennis & Juliet Eilperin, *Facing Senate rejection, controversial pick to head EPA chemical office bows out*, WASH. POST (Dec. 13, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/12/13/facing-senate-rejection-controversial-pick-to-head-epa-chemical-office-bows-out/?utm_term=.9a57e1df4ce2 (quoting Richard Denison, a lead senior scientist at EDF); Richard Denison, *Is there no limit to industry’s overreach and hubris when it comes to new chemicals under TSCA?*, EDF HEALTH BLOG (Dec. 12, 2017), <http://blogs.edf.org/health/2017/12/12/is-there-no-limit-to-industrys-overreach-and-hubris-when-it-comes-to-new-chemicals-under-tsca/>; Richard Denison, *Too little, too late: Why SNURs alone are not a sufficient alternative to consent orders for new chemicals*, EDF HEALTH BLOG (Nov. 30, 2017), <http://blogs.edf.org/health/2017/11/30/too-little-too-late-why-snurs-alone-are-not-a-sufficient-alternative-to-consent-orders-for-new-chemicals/>; Press Release, Environmental Defense Fund, *EPA’s Scott Pruitt Attacks Scientific Integrity, Puts American Families’ Health in Danger* (Oct. 31, 2017), *available at* <https://www.edf.org/media/epas-scott-pruitt-attacks-scientific-integrity-puts-american-families->

- 2) There is widespread public interest in the management of the chemicals program at EPA, including the implementation of the Lautenberg Act. For example, the *New York Times* recently ran a front page story about the current implementation of the TSCA program. Eric Lipton, *Why Has the E.P.A. Shifted on Toxic Chemicals? An Industry Insider Helps Call the Shots*, N.Y. TIMES, Oct. 21, 2017, at A1, available at <https://www.nytimes.com/2017/10/21/us/trump-epa-chemicals-regulations.html>. According to the service Shared Count, this article was shared approximately 48,700 times on Facebook, Pinterest, and LinkedIn. This figure does not include twitter shares, and the article was widely shared on twitter as well. For example, just one of the author's tweets about the article was retweeted over 3,000 times. Thus, it is likely that this single article on the implementation of TSCA was shared well over 50,000 times on social media.
- 3) EPA has recently adopted interpretations of the Lautenberg Act that differ dramatically from those it previously had articulated. *Compare, e.g.*, 82 Fed. Reg. 7562, 7565 (Jan. 19, 2017) (proposed rule), *with, e.g.*, 82 Fed. Reg. 33,726, 33,728 (July 20, 2017) (final rule). Among other things, EPA states that it may exclude certain activities that EPA has determined to be conditions of use from its risk evaluations. To justify this new position, EPA relies on a single floor statement from the legislative history of TSCA. 82 Fed. Reg. at 33,728 (citing 114 Cong. Rec. S3519-S3520 (daily ed. June 7, 2016) (statement of Sen. Vitter)). Since EPA has given the legislative history surrounding the Lautenberg Act significant weight in the interpretation of the Act, EPA has an obligation to provide the public with the full history of deliberations between EPA and Congress during the negotiations of the Lautenberg Act. Courts have given correspondence from implementing agencies weight when interpreting statutes. *See, e.g., Block v. North Dakota*, 461 U.S. 273, 283 (1983).
- 4) This information is time-sensitive because EPA may be applying its new interpretations during ongoing new chemical reviews, and EPA is explicitly applying these interpretations when analyzing the first ten existing chemicals it has selected to undergo risk evaluations. *See, e.g.*, Scope of the Risk Evaluation for Asbestos, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0736-0086>. EDF has commented on these interpretations in those dockets. *See, e.g.*, EDF Comment, <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0736-0107>. EPA has stated that it will issue problem formulations for these ten chemicals and take additional comment approximately 6 months after the release of the scopes, placing those comment periods around January 2018.
- 5) EPA held a meeting on December 6th for the public to provide input on the new chemicals program, and a meeting on December 11th for the public to provide input on identifying potential candidate chemicals for prioritization. EPA is also currently accepting written comments on both of those issues. The comment window for the new

[health-danger](#) (informing public of EPA directive establishing a policy to exclude many impartial researchers from serving as scientific advisors and personnel changes to two major EPA scientific advisory boards); *see also* <https://www.facebook.com/edfhealth/> (over 6,000 people follow the EDF Health Facebook page).

chemicals program is currently scheduled to close on January 20, 2018, and that for prioritization on January 25, 2018.

- 6) Commenters, including EDF, will need access to this history of the legislation so that they can fairly engage in that public process and explain how the full legislative history should or should not inform the Agency's interpretations. EDF needs to receive this information in time to organize it and publish it electronically so that the public can use it during the comment periods discussed above. One of the relevant comment periods closes on **January 20, 2018**.
- 7) Absent expedition, EPA would have 20 working days to respond to this request, 5 U.S.C. § 552(a)(6)(A)(i), and EPA often misses that deadline. By that deadline, roughly one calendar month will have elapsed, during which time the Agency will likely take additional actions on new and existing chemicals based on its interpretation of the Lautenberg Act.

Request for Fee Waiver

As a non-partisan, non-profit organization that provides information that is in the public interest, EDF respectfully requests a waiver of fees associated with this request. We are not seeking information for any commercial purpose and the records received will be used to contribute to a greater public understanding of issues of considerable public interest: EPA's actions in negotiating the Lautenberg Act, which in turn may inform EPA's implementation of that Act. 5 U.S.C. § 552(a)(4)(A)(iii). As discussed above, EDF is well positioned to disseminate the records to the public, as we routinely issue press releases, action alerts, reports, analyses, and other public outreach materials. We fully intend to disseminate information received in response to this request and information developed on the basis of the requested information. Indeed, EDF previously collected some of the legislative history around the efforts to reform TSCA from 2009 to June 22, 2016, when President Obama signed the Lautenberg Act,⁵ and EDF now plans to present a more comprehensive legislative history of the reform efforts from the 114th Congress.

Specifically, EDF has begun preparing a comprehensive collection of the significant portions of the legislative history of the Lautenberg Act from the 114th Congress. We intend to present that collection on our website soon. Once we have the requested materials, we intend to organize them in a convenient form and then present them on our website for public review. Accordingly, we respectfully request that the documents be furnished without charge. 5 U.S.C. § 552(a)(4)(A)(iii).

Each of the four factors used by EPA to evaluate the relevant fee waiver requirement indicates that a fee waiver is appropriate for this request. *See* 40 C.F.R. § 2.107(l)(2).

- (i) The subject of the requested records has a direct and clear connection to identifiable operations or activities of the government. EPA's correspondence with Congress about legislation is itself an activity performed by the federal government, and as

⁵ LEGISLATIVE HISTORY OF CHEMICALS POLICY REFORM, <https://www.edf.org/health/legislative-history-chemicals-policy-reform> (last visited Dec. 14, 2017).

explained above, that correspondence arguably should inform EPA's current implementation of the Lautenberg Act.

- (ii) The disclosable portions of the records are likely to contribute to an understanding of government operations, and to the best of our knowledge, the vast majority of these records are not already in the public domain.
- (iii) Disclosure of this information will contribute to the public understanding about the debates leading to passage of the Lautenberg Act and interpretation of its provisions. As explained above, EDF will share this information with a broader audience. In addition, EDF has unique expertise with respect to the Lautenberg Act because it played a major role in advising Members of Congress during the negotiations surrounding the Act. Senator Markey expressly thanked EDF experts Dr. Richard Denison and Joanna Slaney for their work on the Lautenberg Act. *See* 162 Cong. Rec. S3511, S3515 (daily ed. June 7, 2016). When recognizing all the advocates for TSCA reform, Senator Udall began "[o]f course, I need to start by thanking the Environmental Defense Fund. In particular, Fred Krupp and his staff, Richard Denison, Joanna Slaney, and Jack Pratt." *Id.* at S3524. EDF also has the demonstrated ability to effectively convey relevant information to the public.
- (iv) The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, will be enhanced by the disclosure to a significant extent. The public will better understand EPA's role in the negotiation of the Lautenberg Act, and as noted, much of this information is not publicly available.

Conclusion

For ease of administration and to conserve resources we will accept documents produced in a readily accessible electronic format. Please provide records on a rolling basis; EPA's search for—or deliberations concerning—certain records should not delay the production of others that EPA has already retrieved and elected to produce. In the event EDF's request for a fee waiver is denied or if you have any questions about this request, please contact me immediately by telephone at (202) 572-3398 or by email at rstockman@edf.org.

Respectfully submitted,

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